89-1696

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

FEBRUARY 1, 1990.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

HUBERT C. TAYLOR,
Petitioner,

No. 86-2590

v.

PEABODY COAL CO. AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents.

On Petition for Review of an Order of the Benefits Review Board United States Department of Labor.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by the respondents, no judge in active service* has requested a vote thereon, and all of the judges on the original panel have voted to deny the petitions for rehearing and suggestions for rehearing *en banc*.

The petitions filed by the respondents in this case contend that HEW's rules do not foreclose the use of medical rebuttal evidence and thus our opinion was fatally flawed. However, we note that the precise extent to which the HEW regulations allowed rebuttal was not an issue in this case. We

* Circuit Judge Walter J. Cummings did not participate in any consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above cause.

held that to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid. We did not hold that there are no conceivable circumstances under which HEW rules might allow medical rebuttal.

It is also argued in the petitions that the current statute (30 U.S.C. § 923(b)) directs the Department of Labor to consider "all relevant evidence." This contention is certainly true but it misses the point. While any trier of fact may be required to consider all "relevant" evidence, such a requirement does not alter any substantive rule of law. To what determination is a piece of evidence "relevant"? That is a distinct question, and a standard of admissibility cannot control substantive law. Cf. *Collins v. Old Ben Coal Co.*, 861 F.2d 481, 493 (7th Cir. 1988) (Easterbrook, J., concurring).

With these comments,

IT IS HEREBY ORDERED that the aforesaid petitions for rehearing and suggestions for rehearing *en banc* be, and the same are hereby, DENIED.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

SEPTEMBER 14, 1989.

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. _____
Hon. _____

HUBERT C. TAYLOR,
Petitioner,

No. 86-2590

vs.

PEABODY COAL COMPANY, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR ENLARGEMENT OF TIME TO FILE PETITION FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC" filed herein on September 13, 1989, by counsel for the Peabody Coal Company.

2. "MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING" filed herein on September 14, 1989, by counsel for the Director, Office of Workers' Compensation Programs.

On consideration thereof,

IT IS ORDERED that said motions are hereby GRANTED and the Petition for Rehearing with Suggestion of Rehearing En Banc and the Petition for Rehearing will be due on or before October 2, 1989.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 86-2590

HUBERT C. TAYLOR,

Petitioner,

v.

PEABODY COAL CO. AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ARGUED OCTOBER 28, 1987—DECIDED
JANUARY 25, 1988—
REVERSED AND REMANDED JANUARY 11, 1989—
DECIDED AUGUST 28, 1989 **

Before EASTERBROOK, RIPPLE, AND KANNE, Circuit Judges.

KANNE, Circuit Judge. This appeal has come before us for the second time. In our earlier opinion in this case, *Taylor v. Peabody Coal Co.*, 838 F.2d 227 (7th Cir.), *vacated*, ___ U.S. ___, 109 S. Ct. 548, 102 L. Ed. 2d 576 (1988)

** Pursuant to Circuit Rule 40(f), this opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing en banc on the issue of whether the Labor rebuttal rules violated 30 U.S.C. § 902(f)(2).

("*Taylor I*"), we denied petitioner Hubert C. Taylor's petition for review of the Benefits Review Board's order reversing the decision of the Administrative Law Judge ("ALJ") that Taylor was entitled to black lung benefits. On January 11, 1989, the United States Supreme Court reversed and remanded our decision for reconsideration in light of its recent decision in *Pittston Coal Group v. Sebben*, ___ U.S. ___, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988). On reconsideration, we reverse the decision of the Benefits Review Board and reinstate the ALJ's award of benefits to Taylor.

I. Background

The black lung benefits program, as enacted by Congress, consists of two parts. Part B is a temporary program of federally financed benefits to be administered by the Secretary of Health, Education, and Welfare ("HEW"), and Part C provides for a more permanent program to be administered by the Secretary of Labor, relying on state workers' compensation programs where possible. *Pittston Coal Group*, 109 S. Ct. at 417. The Part B program, which applies to claims filed by living miners before June 30, 1973 and before December 31, 1973 for survivors' claims, is administered under regulations promulgated by HEW. Although HEW promulgated both permanent and interim regulations, only the interim regulations, 20 C.F.R. § 410.490 (1973), are at issue here. These regulations set out criteria under which the presumption of entitlement to black lung benefits under Part B can be invoked by the claimant and rebutted by the employer.[1]

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[1] Because we only are concerned at this point with the validity of the Labor rebuttal rules, we will discuss those rules and the HEW rebuttal rules where appropriate. The validity of the Labor invocation rules already has been decided in *Pittston Coal Group*, where the Supreme Court discussed in detail these rules, the HEW invocation rules and the differences between the two sets of rules, 109 S. Ct. at 417-19. Hence, for brevity's sake, we will not discuss the invocation rules here.

In enacting the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (codified in scattered sections of 30 U.S.C.), which gave the Secretary of Labor authority to establish total disability regulations for Part C cases, Congress provided that "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 . . . " 30 U.S.C. § 902(f)(2). In response to the Black Lung Benefits Reform Act, the Secretary promulgated the interim regulations for Part C cases at issue here.[2] *See* 20 C.F.R. § 727.203.

The petitioner in this case, Hubert C. Taylor, filed his claim for black lung benefits on June 6, 1977. The Office of Workers' Compensation Programs approved his claim on March 31, 1980. Respondent Peabody Coal Company, however, filed a notice of controversion and the matter was referred to the Office of Administrative Law Judges. On August 29, 1985, the ALJ issued his decision and order awarding benefits to Taylor.

In this decision and order, the ALJ examined Taylor's claim under both the Part C regulations and the Part B regulations. Examining Taylor's claim under the Part C regulations, the ALJ found that Taylor successfully had invoked the presumption under 20 C.F.R. § 727.203(a), but that Peabody Coal successfully had rebutted the presumption under 20 C.F.R. § 727.203(b)(2). Peabody Coal was able to rebut the presumption by presenting medical evidence that Taylor had only a mild pulmonary impairment which did not prohibit him from performing his work. Under the Part B regulations, however, the ALJ found that Taylor successfully had invoked the presumption, and that Peabody Coal had failed to rebut the presumption.

Peabody Coal appealed the ALJ's decision to the Benefits Review Board. The Benefits Review Board reversed the

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[2] The permanent Labor regulations took effect on April 1, 1980. 20 C.F.R. § 718.2; *see also Pittston Coal Group*, 109 S. Ct. at 419.

ALJ's decision, determining that Taylor's claim should be resolved exclusively under the Part C (Labor) rules. The Benefits Review Board determined that *Halon v. Director, OWCP*, 713 F.2d 21 (3d Cir. 1983), a case in which the Third Circuit interpreted the "not . . . more restrictive" language of 30 U.S.C. § 902(f)(2) as entitling a claimant to application of the Part B (HEW) rules in a claim disposed of by the Department of Labor, only applied to claims in the Third Circuit and in other circuits having adopted this standard.

Taylor appealed to this court. We affirmed the decision of the Benefits Review Board in our opinion in *Taylor I*. There, we determined that this case was controlled by our then-recent decision in *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987). In *Strike*, we held that in enacting 30 U.S.C. § 902(f)(2), Congress only intended to prohibit the Secretary of Labor from applying more restrictive *medical* criteria in reviewing claims pursuant to 30 U.S.C. § 945. Thus, in *Taylor I*, we interpreted *Strike* as "reject[ing] the argument that Congress intended 20 C.F.R. § 410.490 [the Part B rules] to be applied to Part C claims when it 'liberalized' the Black Lung Benefits Act." *Taylor I*, 838 F.2d at 229.

Taylor filed a petition for certiorari to the Supreme Court. This petition was held in abeyance because of the Supreme Court's pending decision in *Pittston Coal Group*. On December 6, 1988, the Supreme Court decided *Pittston Coal Group*. In that case, the Supreme Court held that the interim Labor rules violated the prohibition in 30 U.S.C. § 902(f)(2) against the Secretary of Labor's employing "[c]riteria . . . not . . . more restrictive than the criteria applicable to a claim filed on June 30, 1973." The Supreme Court determined that the word "criteria" did not refer solely to medical criteria. 109 S. Ct. at 419-23. It also considered, but left open, the question whether § 902(f)(2) applied solely to total disability criteria. *Id.* at 420.

The decision in *Pittston Coal Group*, however, only discussed, and refuted, the validity of the Labor *invocation* rules.

In oral argument before the Supreme Court, the respondents in that case conceded the validity of the Labor *rebuttal rules*, "even though [these rules] permit rebuttal of more elements of statutory entitlement than did the interim HEW regulation." *Id.* at 423. Thus, the Supreme Court did not have to decide the question of the validity of the Labor rebuttal rules under § 902(f)(2), nor did it have to consider the due process arguments raised by the petitioners. *Id.*

On January 11, 1989, the Supreme Court vacated our decision in *Taylor I*, and remanded this case to us for further consideration in light of its decision in *Pittston Coal Group*. Because the ALJ's decision and order determined that Peabody successfully rebutted the presumption under the interim Labor rebuttal rules, we are presented squarely with the issue whether these rules violate 30 U.S.C. § 902(f)(2).

II. Discussion

A. Statutory Language

The criteria under the interim Labor rules for determining whether the presumption has been rebutted differ from the rebuttal criteria in the HEW rules in one important respect. The HEW rules provide that the presumption can be rebutted by a showing that the miner was working or could work at his former coal mine employment or the equivalent. 20 C.F.R. § 410.490(c)(1), (2). In *Cook v. Director, OWCP*, 816 F.2d 1182, 1185 (7th Cir. 1987), we observed in another context that "the [HEW] presumption cannot be rebutted by medical evidence." On the other hand, the interim Labor rebuttal rules provide that "all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b). Once invoked, moreover, the presumption can be rebutted not only on the grounds listed in the HEW regulation, but also on the basis that "the total disability or death of the miner did not arise in whole or in part out of coal mine employment" or that "the miner does not, or did not, have pneumoconiosis." 20 C.F.R. §§ 727.203(b)(1)-(4); *Pittston Coal Group*, 109 S. Ct. at 419.

Although *Pittston Coal Group* did not address, and indeed declined to consider, the validity of the Labor rebuttal rules, we believe that the Supreme Court's decision leaves no room for distinguishing the Labor rebuttal rules from the Labor invocation rules. Because the Labor rebuttal rules allow the consideration of medical evidence on rebuttal, while the HEW rebuttal rules do not, the former clearly are more restrictive than the latter. We note that this is so even if we were to read the term "criteria" as being limited solely to medical criteria, the interpretation of the statute specifically rejected by the Supreme Court in *Pittston Coal Group.*[3]

We respectfully disagree, therefore, with our colleagues in the Sixth Circuit that a valid distinction can be made between the Labor invocation and rebuttal rules regarding the application of § 902(f)(2). *See, e.g., Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 202 (6th Cir. 1989); *Kyle v. Director, OWCP*, 819 F.2d 139, 144 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 566, 102 L. Ed. 2d 591 (1988); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485,

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[3] The result would be the same even if we were to read 30 U.S.C. § 902(f)(2) as being limited to total disability criteria. This is a reading of the statute which, the Supreme Court noted, "has considerable merit, though it is by no means free from doubt," *Pittston Coal Group*, 109 S. Ct. at 420. Total disability is defined as the inability of the claimant to perform his usual coal mine employment or the equivalent. *Id.* As the Court also noted, "The various criteria that go into determining a claim of entitlement under the interim HEW regulation are closely—indeed, inextricably—intertwined," *id.* at 421 (noting that claimants who do not meet the ten-year requirement under the interim Labor invocation rules must submit affirmative proof of total disability, which would involve principally medical proof of disability). Likewise, with regard to the rebuttal rules, it appears that evidence of total disability that could not come in under the HEW scheme could come in under the Labor scheme. This is what occurred in this case. The ALJ concluded that Peabody Coal had rebutted the presumption under 20 C.F.R. § 727.203(b)(2), determining that Taylor could perform his usual coal mine employment. He also concluded, however, that Peabody Coal had not rebutted the presumption under the HEW rebuttal rules, which contain a provision identical to § 727.203(b)(2).

489 (6th Cir. 1985). In *Youghiogheny*, which was decided after *Pittston Coal Group*, the Sixth Circuit distinguished the Labor rebuttal rules from the Labor invocation rules based upon its prior precedent, which made such a distinction.

We believe that the Supreme Court's decision in *Pittston Coal Group* forecloses the distinction the Sixth Circuit makes for the reasons it gives. *Compare Youghiogheny*, 866 F.2d at 199 n.1 ("[T]he *Pittston* opinion sheds no light on the issue before us today"). The Sixth Circuit distinguishes the invocation rules from the rebuttal rules based upon the following legislative history:

> The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that in determining claims under such criteria all relevant medical evidence shall be considered* in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.

H.R. Rep. No. 864, 95th Cong., 2d Sess., *reprinted* in 1978 U.S. Code Cong. & Admin. News 237, 308-09 (emphasis supplied).[4] The Sixth Circuit has interpreted this legislative history to mean that "the conferees intended to establish a medical test for rebuttal by showing the claimant was able to do his usual coal mine work." *Ramey*, 755 F.2d at 489-90. It

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[4] By way of explanation, the House version of the Black Lung Benefits Reform Act of 1977 would have applied the HEW rules to both Part B and Part C claims. The Senate version of the bill, however, authorized the Secretary of Labor to draft his own medical eligibility criteria to be used in adjudicating Part C claims. The Conference Committee, which adopted the Senate bill with several provisos, made the above observations. *Ramey*, 755 F.2d at 489.

has distinguished application of the "not more . . . restrictive . . . criteria" language in 30 U.S.C. § 902(f)(2) to the invocation rules but not to the rebuttal rules on the ground that Congress did not intend this language to require application of the same evidentiary rules to Part B and Part C cases, but rather intended for these rules to change over time. *Kyle*, 819 F.2d at 144; *Ramey*, 755 F.2d at 490.

We disagree with this rationale for several reasons. First, the Court in *Pittston Coal Group* determined that the text of § 902(f)(2) "plainly embraces criteria of more general application" than medical criteria. 109 S. Ct. at 420-21. This includes evidentiary rules and adjudicatory standards, whether they be applied on invocation or on rebuttal. *See Halon*, 713 F.2d at 24 (legislative history of the Black Lung Benefits Reform Act suggests that "criteria" referred to both adjudicatory and medical standards); *but see Pittston Coal Group*, 109 S. Ct. at 430-37 (Stevens, J., dissenting) (argues that Congress in fact meant to distinguish between medical criteria and evidentiary rules). Even if the text conflicts with the legislative history of the statute, moreover, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history," *Pittston Coal Group*, 109 S. Ct. at 420-21; *accord Belisle v. Plunkett*, No. 88-3189, slip op. at 8 (7th Cir. June 6, 1989). Thus, we conclude that the Labor rebuttal rules violate 30 U.S.C. § 902(f)(2).

B. Due Process

Because we have determined that the Labor rebuttal rules violate the prohibition in 30 U.S.C. § 902(f)(2) against "not more . . . restrictive . . . criteria," we must address Peabody Coal's due process challenge. Unlike the majority of due process arguments advanced in this area, which have been in the vein that the applicable statutes and/or regulations regulate too much, Peabody Coal argues here that with respect to private parties, the HEW invocation and rebuttal rules regulate too little. With respect to the invocation rules,

Peabody Coal contends that they violate due process because they do not provide any minimum period of coal mine employment to invoke the presumption. It claims that those cases that have upheld the Labor rules on due process grounds have relied heavily on the requirement of ten years of employment to invoke the presumption. With respect to the HEW rebuttal rules, Peabody Coal seems to argue that application of these rules violates due process because other legitimate means of rebutting the presumption (to wit, those means embodied in 20 C.F.R. §§ 727.203(b)(3), (b)(4)) exist, yet they are unavailable to responsible operators.[5]

This is not the proper case to address Peabody Coal's first argument.[6] Even if we were to decide that due process requires a ten-year minimum period of coal mine employment, Taylor, who worked as a coal miner for approximately forty-two years, has satisfied this condition. Hence, it is not necessary for us to consider here whether there should be such a requirement. *Cf. Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 1431 (10th Cir. 1984) (court of appeals declined to consider constitutional attack on the validity of two of the four parts of the Labor invocation regulation because in that case, even were they to strike down those two parts, disability still would be presumed under the remaining two parts). In general, courts will not consider constitutional arguments where a case may be disposed of on alternate, nonconstitutional grounds. *Jean v. Nelson*, 472 U.S. 846, 854-55, 105 S. Ct. 2992, 2997, 86 L. Ed. 2d 664 (1985); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 412-13, 74 L. Ed. 2d 235 (1982); *Hagans v. Lavine*, 415 U.S. 528, 546-47 & n.12, 94 S. Ct. 1372, 1383-84 & n.12, 39 L. Ed. 2d 577 (1974); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288,

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[5] Sections 727.203(b)(1), (2) of Title 20 of the Code of Federal Regulations parallel 20 C.F.R. §§ 410.490(c)(1), (2).

[6] Peabody Coal argues that allowing the presumption to be invoked on the basis of x-ray evidence alone flunks the "rational connection" test used by the Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 28, 96 S. Ct. 2882, 2898, 49 L. Ed. 2d 752 (1976).

347, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936) (Brandeis, J., concurring).

Peabody Coal's second argument, with respect to the rebuttal rules, is without merit. What it essentially argues (in light of our holding above with respect to § 902(f)(2)'s restriction on the rebuttal rules) is that it has been deprived of due process because Congress could have made available more factors under which the presumption could be rebutted, yet it did not do so. We rejected a similar argument in *Battaglia v. Peabody Coal Co.*, 690 F.2d 106, 112-13 (7th Cir. 1982). In holding that 30 U.S.C. § 921(c)(5) did not violate the due process clause because it did not distinguish between surface and underground miners, we relied in part on the Supreme Court's words in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976) where it said:

> In its "rough accommodations," . . . Congress was surely entitled to select duration of employment, to the exclusion of the degree of dust exposure and other relevant factors, as signaling the point at which the operator must come forward with evidence of the cause of pneumoconiosis or death, as the case may be. We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner.

428 U.S. at 29-30, 96 S. Ct. at 2899 (citations omitted). Likewise, we do not think that 30 U.S.C. § 902(f)(2), in forbidding consideration of certain criteria on rebuttal, operates in a "purely arbitrary" manner.

III. Conclusion

The Supreme Court's opinion in *Pittston Coal Group* indicates that we must apply the HEW invocation rules to this Part C case. We have concluded that *Pittston Coal Group's* reasoning requires us to apply the HEW rebuttal rules as well. The ALJ determined, as discussed above, that Taylor

successfully invoked the presumption under the HEW rules and that Peabody Coal failed to rebut it. Therefore, we REVERSE the determination of the Benefits Review Board and reinstate the ALJ'S award of benefits to Hubert C. Taylor.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JANUARY 30, 1989.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

HUBERT C. TAYLOR, *Petitioner,* No. 86-2590 *vs.* PEABODY COAL COMPANY, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondents.*	Petition for Review of an Order of the Benefits Review Board.

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO SCHEDULE CASE FOR BRIEFING AND ORAL ARGUMENT FOLLOWING SUPREME COURT REMAND" filed herein on January 17, 1989 by counsel for the respondents.

2. "PETITIONER'S POSITION FOLLOWING SUPREME COURT REMAND AND RESPONSE TO THE DIRECTOR'S MOTION AND PEABODY'S REQUEST TO SCHEDULE CASE FOR BRIEFING AND ORAL ARGUMENT" filed herejn on January 23, 1989.

On consideration thereof,

IT IS ORDERED that the "MOTION TO SCHEDULE CASE FOR BRIEFING AND ORAL ARGUMENT FOLLOWING SUPREME COURT REMAND" is DENIED.

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JANUARY 25, 1988.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

HUBERT C. TAYLOR, *Petitioner,*	
No. 86-2590	
vs.	Petition for Review of an Order of the Benefits Review Board
PEABODY COAL COMPANY, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondents.*	

This cause was heard on the record from the Benefits Review Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the petition seeking review of the Board's decision is DENIED, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 86-2590

HUBERT C. TAYLOR,

Petitioner,

v.

PEABODY COAL COMPANY AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION,

Respondents.

ARGUED OCT. 28, 1987.
DECIDED JAN. 25, 1988.

JACK N. VANSTONE, VANSTONE & KROCHTA, EVANSVILLE, IND.,

for petitioner.

W.C. BLANTON, ICE, MILLER, DONADIO & RYAN, INDIANAPOLIS, IND.,

for respondents.

Before

EASTERBROOK, RIPPLE, and KANNE,

Circuit Judges.

KANNE,

Circuit Judge.

Petitioner is Hubert C. Taylor, ("Taylor"), a retired miner. Respondent is Peabody Coal Co., ("Peabody"), his former employer. This appeal concerns Taylor's 1978 claim for benefits under the Black Lung Benefits Act, 30 U.S.C.

§§ 901-945. We have jurisdiction pursuant to § 21(c) of the Longshoreman's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 921(c), as incorporated by § 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a). Congress divided black lung benefits claims into two separately administered programs, one formerly regulated by the Secretary of Health, Education and Welfare under 20 C.F.R. § 410.490 (Part B) and another regulated by the Secretary of Labor under 20 C.F.R. § 727.203 (Part C). Claims filed before December 31, 1973 are resolved under Part B's provisions and those filed after that date are administered under Part C's provisions. We agree with the analysis of the Benefits Review Board, which found that because Taylor's claim was filed after the December 31, 1973 cut-off date, it must be resolved under the Part C provisions found at 20 C.F.R. § 727.203. We therefore deny Taylor's petition for review.

The Office of Workers' Compensation Programs approved Hubert Taylor's application for benefits on March 31, 1981. Peabody filed a Notice of Controversion on April 8, 1980 and requested a formal hearing.

The Administrative Law Judge ("ALJ") held a hearing on December 4, 1984. Because Taylor's claim was filed after the deadline for Part B claims, the ALJ initially applied Part C regulations promulgated by the Secretary of Labor. The ALJ found that Taylor met his initial burden under 20 C.F.R. § 727.203 by establishing a rebuttable presumption that he was entitled to benefits. The ALJ concluded, however, that Peabody successfully rebutted the interim presumption pursuant to 20 C.F.R. § 727.203(b)(2) by presenting medical evidence that Taylor had only a mild pulmonary impairment which did not prohibit him from performing his work.

Taylor argued that Congress intended to liberalize eligibility for black lung benefits. The ALJ next examined Taylor's claim under the Part B regulations. He found that Taylor was entitled to benefits and that Peabody failed to rebut the presumption that Taylor should receive black lung benefits.

Peabody then appealed the ALJ's decision to the Benefits Review Board ("Board"). The Board reversed the ALJ's application of Part B regulations and held that claims for black lung benefits filed after December 31, 1973 must be resolved through an exclusive application of Part C regulations.

Petitioner argues that in amending the Black Lung Benefits Act, Congress intended to liberalize the eligibility requirements. Title 30 U.S.C. § 902(f)(2)(C) mandates that "[r]egulations promulgated under this subsection by the Secretary of Labor; *shall not be more restrictive* than the criteria applicable to a claim filed on June 30, 1973. . . . (Part B)." Taylor interprets the "not more restrictive" language of the statute as a direction to consider his claim under the more "liberal" criteria of Part B. Petitioner contends that this interpretation is more consistent with the policy of liberalization underlying the amended Black Lung Benefits Act. In his initial brief, petitioner cites *Halon v. Office of Workers' Compensation Programs*, 713 F.2d 21 (3rd Cir. 1982) in which a claim for black lung benefits was filed after the 1973 deadline and disposed of by the Department of Labor. In *Halon*, the Third Circuit interpreted the "not more restrictive" language of 30 U.S.C. § 902(f)(2) as entitling the claimant to the benefit of disposition under Part B.

The *Halon* court wrote:

> We agree . . . that if the Board is to effectuate the intent of Congress in enacting the 1977 Amendments to the Black Lung Benefits Act, of which 30 U.S.C. § 902(f)(2) is a part, it must apply the presumption in C.F.R. § 410.490(b) whenever the claimant establishes pneumoconiosis by x-ray, biopsy or autopsy, and also establishes that the pneumoconiosis arose out of coal mine employment.

Halon, 713 F.2d at 31. Other circuits are in accord. *Coughlan v. Director, OWCP*, 757 F.2d 966, 968 (8th Cir. 1985); *Kyle v. Director, OWCP*, 819 F.2d 139, 143 (6th Cir. 1987); *Broyles v. Director, OWCP*, 824 F.2d 327 (4th Cir. 1987); *In re Sebben*, 815 F.2d 475 (8th Cir. 1987) (*petition for cert. filed*).

However, we do not agree with this interpretation. In *Strike v. Director*, 817 F.2d 395 (7th Cir. 1987), as in the case at bar, the claimant sought consideration under the Part B regulations of 20 C.F.R. § 410.490 because the criteria for the Part C regulations under 20 C.F.R. § 727.203 were "more restrictive."

We reviewed the legislative history of the term "criteria," and held that:

> [W]e are nonetheless convinced that the statute and the relevant legislative history do make clear that in enacting § 902(f)(2), *Congress only intended to prohibit the Secretary of Labor from applying more restrictive medical criteria* in reviewing previously denied and pending claims pursuant to § 945.

Strike, 817 F.2d at 404. (Emphasis added.)

Thus, this circuit has rejected the argument that Congress intended § 410.490 to be applied to Part C claims when it "liberalized" the Black Lung Benefits Act.

Petitioner, in his initial brief, said the case is like *Halon*. In his reply brief (after *Strike*) he distinguishes this case from *Halon*. Petitioner cannot have it both ways. It is well settled that issues appearing for the first time in a reply brief will not be considered by this court. *See* Rule 9(c) of the Rules of the United States Court of Appeals for the Seventh Circuit; *Matter of Bear*, 789 F.2d 577, 579 (7th Cir. 1986); *Christmas v. Sanders*, 759 F.2d 1284, 1292 (7th Cir. 1985); *Beerly v. Department of Treasury*, 768 F.2d 942, 949 (7th Cir. 1985).

Because we adhere to our holding in *Strike* that "[t]he Part B and Part C programs were intended to be separate and

distinct," *Id.* p. 405, we find that the Board correctly resolved Taylor's claim by exclusively applying the Part C regulations. Taylor did not establish eligibility for black lung benefits under Part C, and the ALJ cannot refer to the procedural provisions of Part B. Thus, Taylor's petition seeking review of the Board's decision is DENIED.

United States Supreme Court

MEMORANDUM DECISION

HUBERT C. TAYLOR,

petitioner,

v.

PEABODY COAL COMPANY, et al.

No. 87-1720

Case below, 838 F.2d 227.

Dec. 12, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Pittston Coal Group v. Sebben*, 488 U.S. ___, 109 S. Ct. 414, ___L. Ed. 2d ___ (1988).

Justice BRENNAN took no part in the consideration or decision of this case.

U.S. Department of Labor

Benefits Review Board
1111 20th Street, N.W.
Washington, D.C. 20036
BRB No. 85-2177 BLA
OWCP No. 310-10-4934

HUBERT C. TAYLOR
Claimant-Respondent

v.

PEABODY COAL COMPANY
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION AND ORDER

NOT PUBLISHED
July 29, 1986

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Jack N. VanStone (VanStone and Krochta), Evansville, Indiana, for claimant.

David J. Mallon, Jr. (Ice, Miller, Donadio and Ryan), Indianapolis, Indiana, for employer.

Michael J. Denney (Donald S. Shire, Associate Solicitor of Labor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (82-BLA-3822) of Administrative Law Judge Robert L. Hillyard awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* The administrative law judge found the evidence sufficient to invoke the interim presumption under 20 C.F.R. § 727.203(a)(1) and to establish rebuttal under 20 C.F.R. § 727.203(b)(2). The administrative law judge concluded that the Section 727.203(b)(2) rebuttal finding precluded a finding of entitlement under the permanent criteria of 20 C.F.R. Part 410, Subpart D. Upon application of the interim criteria of Part 410 to the facts of this case, however, the administrative law judge determined that claimant had established invocation of the Section 410.490 presumption. *See Halon v. Director, OWCP*, 713 F.2d 30, 5 BLR 2-20 (3d. Cir. 1982), *aff'd on rehearing*, 713 F.2d 21 (1983); 20 C.F.R. § 410.490(b). Notwithstanding his finding of rebuttal pursuant to Section 727.203(b)(2), the administrative law judge found that rebuttal of the Section 410.490 presumption had not been established under *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 5 BLR 2-30 (6th Cir. 1983). *See* 20 C.F.R. § 410.490(c). Employer assigns error to the administrative law judge's application of the provisions of Section 410.490 against an employer and carrier in a case arising in the Seventh Circuit, Employer's brief at 4-5, 6-9, Employer's reply brief at 1-3, and to the administrative law judge's application of the vocational disability rule set forth in *Haywood, supra* to this Part C claim. Employer's brief at 3-4; *see Ramey v. Kentland Elkhorn Coal*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

Corp., 755 F.2d 485, 490 (6th Cir. 1985). Employer additionally contends that the administrative law judge's assessment of interest against employer commencing with the putative month of entitlement, *i.e.*, June 1977, constitutes error. Employer's brief at 5-6.

The Board's scope of review is governed by statute. If the administrative law judge's findings of fact are supported by substantial evidence, are rational, and are in accordance with law, they are binding upon the Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's challenge to the administrative law judge's award of benefits on the basis of *Halon, supra*, 713 F.2d 30, 5 BLR 2-20 (3d. Cir. 1982), *Coughlan v. Director, OWCP*, 757 F.2d 966, 7 BLR 2-177 (8th Cir. 1985), and the presumption found at Section 410.490, is dispositive of this appeal. The Board has held that the *Halon* holding will be followed only in the Third Circuit and in other circuits having adopted *Halon, viz.*, the Eighth Circuit. *See Stanton v. Director, OWCP*, 8 BLR 1-438 (1986); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The instant case arises in The Seventh Circuit.[1] *See Hon v. Director, OWCP*, 699 F.2d 441, 444 (8th Cir. 1983); *Tobin v. Director, OWCP*, 8 BLR 1-115, 1-118 n. 2 (1985). We therefore

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[1] The administrative law judge erroneously assumed that this case is governed by the law of the United States Court of Appeals for the Sixth Circuit. *See* Decision and Order at 11 n. 3. Although neither the hearing transcript nor the documentary evidence of record clearly identifies the state in which claimant's coal mine employment occurred, the record indicates that the hearing was convened in claimant's home state of Indiana, counsel for claimant and employer practice in Indiana, claimant was married in Indiana (Director's Exhibit 4), and claimant obtained medical treatment in Indiana. Consequently, we hold, as urged by employer and the Director (*see* Employer's brief at 4; Director's brief at 3) that the present case arises in the Seventh Circuit.

reverse the administrative law judge's award of benefits since it was predicated on the erroneous application of *Halon, supra*, and the Section 410.490 presumption. Because we reverse the award, we need not reach employer's arguments concerning the invalidity of Section 410.490 as applied to an employer and carrier, the inapplicability of the *Haywood* vocational disability rule, or the assessment of interest. Finally, we affirm the administrative law judge's finding of rebuttal under Section 727.203(b)(2) since this determination was not challenged on appeal.

Accordingly, the Decision and Order awarding benefits is reversed.

SO ORDERED.

/s/ James F. Brown

JAMES F. BROWN
Administrative Law Judge

/s/ Nancy S. Dolder

NANCY S. DOLDER
Administrative Appeals Judge

/s/ David A. Clarke, Jr.

DAVID A. CLARKE, JR.
Administrative Law Judge

Dated this 29th day
of July 1986

U.S. Department Of Labor

Office of Administrative Law Judges
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202
(513) 684-3252

In the Matter of
HUBERT C. TAYLOR
Claimant
v.
PEABODY COAL COMPANY
Employer
and
OLD REPUBLIC INSURANCE COMPANY
Carrier
and
DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Date Issued: Aug. 29, 1985
Case No. 82-BLA-3822
OWCP No. CO 310-10-4934 LM
Not-Published

APPEARANCES:[1]
JACK N. VANSTONE, ESQ.
For the Claimant
JACQUELINE A. SIMMONS, ESQ.
For the Employer/Carrier
BEFORE:
ROBERT L. HILLYARD
Administrative Law Judge

[1] The Director, Office of Workers' Compensation Programs, was not represented by counsel at the hearing.

DECISION AND ORDER—AWARD OF BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. Section 901 *et seq.* In accordance with the Act, and the Regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing in this case was held in Evansville, Indiana, on December 4, 1984. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the Regulations issued thereunder which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that title.

The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

The Claimant, Hubert C. Taylor, on June 6, 1977, filed a claim for benefits under the Federal Coal Mine Health and

Safety Act of 1969, as amended (DX 1).[2] His claim was approved by the Office of Workers' Compensation Programs on March 31, 1980 (DX 15). Peabody Coal Company was identified as the responsible operator and filed its notice of controversion on April 8, 1980 (DX 13-16). A formal hearing was requested and the case was referred to the Office of Administrative Law Judges on December 18, 1981 (DX 23).

II. ISSUES

The specific issues presented for resolution are:

1. Whether the miner has pneumoconiosis as defined by the Act and the regulations;

2. Whether the miner's pneumoconiosis arose out of coal mine employment;

3. Whether the miner is totally disabled; and

4. Whether the miner's disability is due to pneumoconiosis.

An Administrative Law Judge is precluded from ruling on the constitutionality of the Act and regulations he is called upon to interpret. Therefore, this issue will not be addressed (DX 23; Tr. 12).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Claimant's Background

1. The Claimant, Hubert C. Taylor, was born on April 8, 1915 and was 69 years of age at the time of the hearing. He has a fifth grade education (DX 1).

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[2] "DX" refers to the Director's exhibits, "CX" refers to the Claimant's exhibits, "EX" refers to the Employer's exhibits, and "Tr." refers to the transcript of the hearing.

2. The Claimant has one dependent for purposes of augmentation of benefits, his wife, Ida Mae Taylor, whom he married on October 4, 1941 (DX 4; Tr. 14).

B. Coal Mine Employment

Length of coal mine employment is not a contested issue in this case. On his application for benefits, the Claimant alleged 42 years of coal mine employment ending in November, 1976 (DX 1). The personnel records of Peabody Coal Company show that the Claimant was employed by Peabody Coal or its predecessor companies from May, 1934, and was still active through March 24, 1976 (DX 3). The last job which the Claimant performed over a substantial period of time was as a ramp operator (Tr. 14). Therefore, I find that the Claimant has established 42 years of coal mine employment ending in 1976.

IV. MEDICAL EVIDENCE

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	7-9-84	CX 2	Baker Bd. Cert. Rad.	1/2 q	Acceptable
2.	7-9-84 (reread)	EX 6	McGraw B reader; Bd. Cert. Rad.	1/0 s	Acceptable
3.	7-9-84 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
4.	7-9-84 (reread)	EX 8	Renn B reader	No pneumoconiosis	Acceptable
5.	7-5-84 (reread)	EX 6	McGraw B reader; Bd. Cert. Rad.	1/0 s	Acceptable
6.	7-5-84 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
7.	7-5-84 (reread)	EX 8	Renn B reader;	1/0 s/t	Acceptable
8.	12-19-79	DX 10, DX 11	Noveroske Bd. Cert. Rad.	Completely negative	Not noted

	Date	Exhibit	Doctor	Reading	Standards
9.	12-19-79 (reread)	DX 9	Greene B reader	1/0 t	Acceptable
10.	12-19-79 (reread)	EX 4	McGraw B reader; Bd. Cert. Rad.	1/0 s/s	Acceptable
11.	12-19-79 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
12.	12-19-79 (reread)	EX 8	Renn B reader	No pneumoconiosis	Acceptable
13.	12-10-79 (reread)	DX 18	Beeler Bd. Cert. Rad.	1/1 s	Not noted
14.	12-15-76	DX 19	Harmon	Normal chest (not read for pneumoconiosis)	Not noted
15.	12-1-76	EX 3	Hendershot	Essentially normal chest	Not noted
16.	9-1-70	DX 19	Cook	Mild aortic arteriosclerosis; pleural scarring	Not noted
17.	9-6-67	DX 19	Hovda	Normal chest (not read for pneumoconiosis)	Not noted

B. Pulmonary Function Studies

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
1.	7-5-84	CX 2, CX 3	Houser	71"	2.49	73.3	Comprehension & cooperation not noted; 3 tracings

Comment: Mild reduction in forced vital capacity with no evidence of airway obstruction; moderate reduction in MVV noted.

Note: Dr. James Vest found this pulmonary function study invalid for accurate interpretation due to suboptimal patient effort (EX 8).

Note: Dr. Peter Tuteur found the forced expiratory maneuvers and MVV maneuvers invalid for interpretation of maximum pulmonary function and stated that the absolutely normal FEV_1 and FVC suggested the absence of a significant ventilatory defect (Ex 8).

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
2.	12-19-79	DX 6	Ali	71″	1.98	70	Good comprehension & cooperation; 3 tracings

In a validation study, Dr. Long found vents unacceptable because of poor effort, especially on FEV_1 (DX 6).

In a validation study, Dr. J. Vest found vents unacceptable due to suboptimal patient effort (EX 1).

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
3.	11-29-76	EX 3	Korn	71″	2.67	35	Some difficulty following instructions; no tracings

C. Blood Gas Studies

	Date	Exhibit	pCO_2	pO_2
1.	7-5-84	CX 2	35.0	100.3
2.	12-19-79	DX 6, DX 8	23.1	63.4

Comment: These functions are consistent with a severe restrictive ventilatory defect. There is no evidence of obstruction. Blood gases indicate hypoxemia with hyperventilation.

Note: In a validation study, Dr. Long found these results unacceptable and not feasible, due to probable mechanical or technical error (DX 6).

Note: Dr. Vest doubted the validity of these results due to the low pCO_2 and the normal pH (EX 2).

D. Narrative Medical Evidence

1. Dr. Syed A. Ali examined the Claimant on December 28, 1979, at which time he reviewed the Claimant's symptoms and his occupational (coal mine employment from 1934 to 1977), medical, smoking (one and one-half packs of cigarettes per day for 32 years, stopped on June 14, 1975), and family histories, and performed a physical examination, pulmonary function study, blood gas study and x-ray. He diagnosed (1) Restrictive lung disease without obstructive component; (2) Obesity; and (3) Arthritis, left knee,

status post op. In his opinion, some of the Claimant's disability could be attributed to obesity and some to arthritis of the left knee, and he stated that exposure to dust in coal mines did not seem to be a major factor. Dr. Ali also stated that the Claimant stopped coughing when he quit smoking on June 14, 1975 (DX 7).

Dr. Ali stated in a deposition taken on January 30, 1985, that he examined the Claimant on December 28, 1979. He reviewed the medical report that he prepared at that time, and stated that he also saw the Claimant six times after the initial examination for his heart and knee problems. Dr. Ali stated that, in his opinion, the Claimant was not severely disabled, but what disability he did have was caused by a combination of factors. Dr. Ali believed that obesity was the major cause of his disability, but also thought that cigarette smoking, 42 years of coal mine employment, and the Claimant's knee condition also contributed to his disability. Dr. Ali also noted that the Claimant suffered from congestive heart failure due to arteriosclerotic heart disease (EX 7).

2. Dr. David W. Howard testified in a deposition taken on January 11, 1985, that he reviewed the Claimant's hospital record, x-rays, pulmonary function studies, blood gas studies, the report of Dr. Ali and the telephonic deposition of the Claimant taken on November 22, 1984, concerning his coal mine employment. He stated that he disagreed with Dr. Ali's finding of a restrictive disease and believed that the pulmonary function study of December 19, 1979 showed a moderate obstructive pulmonary impairment rather than a restrictive impairment because a restrictive impairment could not be diagnosed without other studies. Dr. Howard concluded that the Claimant had simple pneumoconiosis, very mild impairment, and stated that his heart disease and obesity could contribute to this impairment. After reviewing the Claimant's description of his job as a ramp operator, Dr. Howard stated that the Claimant could perform this job from a pulmonary standpoint (EX 5).

3. Records from St. Mary's Hospital in Evansville, Indiana, show that the Claimant was admitted on September 9, 1967 and discharged on September 12, 1967 with a final diagnosis of

macrofollicular adenoma of thyroid. A subtotal thyroidectomy was performed (DX 19).

Records show that the Claimant was admitted to St. Mary's Hospital on August 31, 1970 and discharged on September 8, 1970 with a final diagnosis of Arteriosclerotic cardiovascular disease; Peripheral arteriosclerosis; Phlebothrombosis, right leg; Pulmonary emphysema (DX 19).

The Claimant was admitted to St. Mary's on December 6, 1976 with severe osteoarthritic change of the left knee for total knee arthroplasty. Dr. Korn reported that several medical problems prompted surgical admission for treatment of organic heart disease with significant right and left sided congestive heart failure. He performed a physical examination and EKG, and stated that a left total knee arthroplasty was performed by Dr. A. Percinel. He also noted a 54 pack-year smoking history, none in the last year. Dr. Korn diagnosed (1) Destructive arthritis of the left knee; (2) History of syphilis with positive FTA-ABS; (3) Exogenous obesity; (4) Organic heart disease; and (5) Hyperuricemia. A left total knee replacement was performed (DX 19).

4. Dr. A. K. Percinel stated in a letter dated November 24, 1980, that he first saw the Claimant on November 17, 1976 and treated him for degenerative arthritis of his left knee. He did not evaluate him for black lung (DX 18).

V. DISCUSSION AND APPLICABLE LAW

Since the Claimant has established more than ten years of coal mine employment, he will be entitled to a rebuttable presumption of total disability due to pneumoconiosis provided one of the four conditions in §727.203(a) is met.

Under §727.203(a)(1), the presumption will be invoked by autopsy, biopsy or x-ray evidence establishing the existence of pneumoconiosis. In this case, there is no autopsy or biopsy evidence. The record contains 17 readings of seven separate x-rays. The x-ray of July 9, 1984 was read as positive for pneumoconiosis by Dr. Baker, a board certified radiologist, and by Drs. McGraw

and Bridges, who are both B readers and board certified radiologists, and was read as negative for pneumoconiosis by Dr. Renn, also a B reader and board certified radiologist. The x-rays of July 5, 1984 and December 19, 1979 were read as positive for pneumoconiosis by Drs. McGraw, Greene (a B reader), and Bridges, and were read as negative by Dr. Renn. The x-ray of December 19, 1979 was read as negative by a board certified radiologist and the x-ray taken on December 10, 1979 was read as positive by a board certified radiologist. Two additional x-rays, taken on December 15, 1976 and September 6, 1967, were not read for pneumoconiosis, and the x-rays of December 1, 1976 and September 1, 1970 did not mention pneumoconiosis. I place greater weight on the nine positive x-ray readings because five different board certified radiologists and/or B readers found x-ray evidence of pneumoconiosis, whereas only two radiologists and/or B readers found no evidence of pneumoconiosis. Therefore, the presumption is invoked under §727.203(a)(1).

Under §727.203(a)(2), the presumption will be invoked by ventilatory studies with results equal to or less than the listed table values. In order to invoke the presumption under this section, the study must be both qualifying (equal to or below the table values) and conforming (meeting the requirements of §410.430). In this case, the pulmonary function studies of December 19, 1979 and July 5, 1984 both produced qualifying values. However, Drs. Long and Vest both found the pulmonary function study of December 19, 1979 unacceptable due to sub-optimal patient effort. Drs. Vest and Tuteur also found the pulmonary function study of July 5, 1984 invalid due to sub-optimal patient effort, and Dr. Houser, the performing physician, did not note the Claimant's cooperation or comprehension. The qualifications of Drs. Vest and Tuteur are included in the record and I find that their opinions are sufficient to discredit the pulmonary function study. Therefore, the presumption is not invoked under §727.203(a)(2).

To invoke under §727.203(a)(3), there must be blood gas studies with results equal to or less than the listed table values. In this case, the blood gas study of December 19, 1979 produced qualifying values, but Dr. Long found that these results were not

feasible and probably the result of mechanical or technical error, and Dr. Vest doubted the validity of this test due to the low pCO_2 and the normal pH. Dr. Howard stated that these blood gases could be valid, but that he would like to see a repeat test. In addition, the blood gas study of July 5, 1984 produced non-qualifying values and this study is more probative of the Claimant's current condition because it was performed four years later. Therefore, due to the questionable validity of the December 19, 1979 study and the fact that the more recent study of July 5, 1984 did not produce qualifying values, I find that the blood gas studies do not invoke the presumption under §727.203(a)(3).

Under §727.203(a)(4), the presumption will be invoked by other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment establishing the presence of a totally disabling respiratory or pulmonary impairment. In *Meadows v. Westmoreland Coal Company*, 6 BLR 1-773 (1984), the Benefits Review Board held that all medical reports must be weighed before determining whether the presumption should be invoked under §727.203(a)(4). In this case, Dr. Ali examined the Claimant, but did not express an opinion as to the Claimant's disability and Dr. Howard, who reviewed the medical evidence, stated that from a pulmonary standpoint, the Claimant would still be able to perform his usual coal mine job as a ramp operator. Therefore. since there are no medical opinions finding that the presence of a totally disabling respiratory or pulmonary impairment, the presumption is not invoked under §727.203(a)(4).

Once the presumption is invoked, the Claimant will be entitled to benefits unless the presumption is rebutted under §727.203(b). In this case, the presumption is not rebutted under §727.203(b)(1) because the evidence is clear that the miner last worked in 1976 (DX 1; Tr. 14).

To rebut under §727.203(b)(2), the Employer must present evidence that the miner either has no respiratory or pulmonary impairment or that the impairment he does have does not prevent him from performing his usual coal mine work. *Sykes v. Itmann Coal Company*, 2 BLR 1-1089 (1980). In this case, Dr. Howard

found a mild impairment, but stated that, from a pulmonary standpoint, the Claimant could perform his usual coal mine employment. Although Dr. Howard did not examine the Claimant, he based his opinion on the Claimant's histories, including a description of the Claimant's coal mine duties, and on the results of objective testing, and his opinion is uncontradicted. *Worthington v. United States Steel Corporation*, 7 BLR 1-522 (1984). Therefore, I find that the Employer has established that the Claimant's impairment does not prevent him from performing his usual coal mine employment and the presumption is rebutted under §727.203(b)(2).

Section 727.203(b)(3) provides for rebuttal of the presumption where the evidence establishes that the total disability of the miner did not arise, in whole or in part, out of coal mine employment. *Gibas v. Saginaw Mining Company*, 748 F.2d 1112, 1120 (6th Cir. 1984); *Carozza v. United States Steel Corporation*, 727 F.2d 74, 78 (3rd Cir. 1984). In this case, Dr. Ali found that the Claimant's coal mine employment contributed to his disability and Dr. Howard found a mild impairment due to his pneumoconiosis. Therefore, the presumption has not been rebutted under §727.203(b)(3).

Under §727.203(b)(4), the presumption will be rebutted if the evidence establishes that the Claimant does not have pneumoconiosis. In this case, the x-ray evidence establishes the presence of pneumoconiosis. Therefore, the presumption is not rebutted under §727.203(b)(4).

Because the Claimant has not established entitlement to benefits under §727.203, he must establish entitlement under 20 C.F.R. Part 410 to be awarded benefits. My finding that the Claimant has not established a totally disabling pulmonary or respiratory impairment precludes an award of benefits under the permanent criteria

of Part 410. *Clay v. Director*, 7 BLR 182 (1984). Under §410.490,[3] a miner will be presumed to be totally disabled by pneumoconiosis if the x-ray, biopsy or autopsy evidence establishes pneumoconiosis and it is established that the pneumoconiosis arose out of the miner's coal mine employment. In this case, as discussed under §727.203(a)(1), the x-ray evidence establishes pneumoconiosis. Under §410.416(a), pneumoconiosis will be presumed due to coal mine employment, where, as here, the miner had over ten years of coal mine employment. In addition, neither physician found that the miner's pneumoconiosis did not arise from his coal mine employment. Therefore, I find that the evidence establishes that the miner's pneumoconiosis arose out of his coal mine employment under §§410.416(a) and 410.490.

The §410.490 presumption of total disability due to pneumoconiosis can be rebutted only by evidence establishing that the Claimant is not vocationally disabled. *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277 (6th Cir. 1983). Since no evidence was offered to show that the miner could have returned to his coal mine employment, I find that the §410.490 presumption is unrebutted. Accordingly, I find under §410.490 that the miner was totally disabled by pneumoconiosis and, therefore, he is entitled to benefits.

VI. ENTITLEMENT

The Claimant, Hubert C. Taylor, is entitled to benefits under the Act.

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[3] Section 410.490 appears to preclude the use of this section in a Part C claim. However, the Third and Eighth Circuits have held that this regulation is applicable to all cases adjudicated under 30 U.S.C. §945. *Coughlan v. Director*, 757 F.2d 966 (8th Cir. 1985); *Halon v. Director*, 713 F.2d 21 (3rd Cir. 1983). Since this case was pending on March 1, 1978, it is being adjudicated under 30 U.S.C. §945(b)(1). While *Halon* is not binding on cases arising in the Sixth Circuit, I am persuaded by this Decision and a review of the Act that the use of §410.490 is appropriate. In addition, while the Sixth Circuit has not specifically addressed this issue, the court held in *Dickson v. Califano*, 590 F.2d 616 (6th Cir. 1978), that the Black Lung Benefits Reform Act of 1977 had the effect of making the interim presumption of the 1972 Act fully applicable to claims filed after June 30, 1973.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made herein because no application has been received from counsel. A period of thirty (30) days is hereby allowed for Claimant's counsel to submit an application. The application must conform to 20 C.F.R. §§725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served have ten days (10) following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

VIII. ORDER

The Employer, Peabody Coal Company, is hereby ordered to:

1. Pay to the Claimant all benefits to which he is entitled under the Act, commencing June, 1977, augmented by reason of his dependent wife;

2. Pay to the Claimant all medical benefits to which he may be entitled;

3. Reimburse the Secretary of Labor for any payments the Secretary has made to the Claimant, and to deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraphs 1 and 2 above; and

4. Pay to the Secretary of Labor interest as provided by law from the date upon which any payment would originally have been due if payment had been made from the date set forth above until the date upon which payment is actually made.

/s/ Robert L. Hillyard

ROBERT L. HILLYARD
Administrative Law Judge

U.S. CONST.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

30 U.S.C. § 901(a)

§ 901. Congressional findings and declaration of purpose; short title

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. § 902(f)

§ 902. Definitions

For purposes of this subchapter—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 923(b)

§ 923. Filing of notice of claim

(b) Utilization of personnel and procedures; evidence required to establish claim; medical evidence; affidavits; autopsy reports; reimbursement of expenses

In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act [42 U.S.C.A. § 423], but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case, other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981, in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this subchapter if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim

has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 221 of such Act [42 U.S.C.A. § 421(a) to (d), (g)] shall be applicable. The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act [42 U.S.C.A. §§ 404, 405(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 406, 407, 408], shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act [42 U.S.C.A. § 401 et seq.]. Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.

30 U.S.C. § 932(c)

§ 932. Failure to meet workmen's compensation requirements

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

20 C.F.R. § 410.490

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his

death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the

blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.